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In the Supreme Court of the United States

OCTOBER TERM, 1955

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN CRAYON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review that part of the judgment of the Court of Appeals for the Sixth Circuit entered on April 20, 1955, which set aside portions of the Commission order involved in this case.

OPINION BELOW

The Court of Appeals did not render any opinion. Its judgment is reported at 223 F. 2d 264.

JURISDICTION

The judgment of the Court of Appeals (App. 15–16) was entered on April 20, 1955, and a timely petition for rehearing was denied on May 16,

1955 (App. 17). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Frankfurter on August 12, 1955, to September 13, 1955 (App. 17). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Federal Trade Commission in 1940 issued a cease-and-desist order prohibiting respondent from continuing to engage in certain selling practices found to be in violation of Sections 2 (a) and 2 (d) of the Clayton Act. No judicial review was then sought of that order. In 1953 the Commission, after an adversary hearing, found that the 2 (d) provisions of the order, but not the 2 (a) provisions, had been, and were continuing to be, violated. The Commission then petitioned the court of appeals to affirm and enforce the entire order. The court affirmed and enforced the 2 (d) provisions, but set aside the 2 (a) provisions on the ground that no violations thereof had been shown.

The question presented is whether a court of appeals may set aside parts of a Commission order, which it has not found to be invalid, solely because no violations thereof have been shown.

STATUTE INVOLVED

The pertinent provisions of the Act of October 15, 1914, 38 Stat. 730, as amended, 15 U. S. C.

12, *et seq.*, commonly known as the Clayton Act, are as follows:

SEC. 2. (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

* * * * *

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by

such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * *

SEC. 11. * * * If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. * * *

STATEMENT

In May 1940, the Federal Trade Commission issued a complaint charging The American Crayon Company ("American Crayon") with unlawful price discriminations in the sale of "art and school supplies" in violation of Sections 2 (a) and 2 (d) of the Clayton Act (R. 2a).[1] American Crayon waived a hearing and signed a stipulation of facts (R. 2a–6a), on the basis of which the Commission was authorized to "make its report stating its findings as to the facts (including inferences which it may draw from said stipulated facts) and its conclusions based thereon and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs" (R. 2a).

The stipulation stated, *inter alia*, that American Crayon sold its products at a regular trade discount of 50% off list price to wholesalers buying in case lots, and had granted an additional discount (ranging from 5 to 20%) to a limited number of wholesalers who were in "active competition" with wholesalers who received only the regular 50% discount (R. 4a). The stipulation further provided that the effect of the foregoing discriminations in price "may be substantially to lessen competition in the lines of commerce in which respondent and its said customers are

[1] Record references are to the appendix to the Commission's Court of Appeals brief.

engaged and to injure competition with the respondent in the sale and distribution" of school supplies, and "may be substantially to injure competition in the resale of such products with the favored customers of respondent who are granted and allowed the discounts as aforesaid over and above the regular trade discount of 50% off the list price" (R. 4a).[2]

The Commission adopted the stipulated facts as its findings of fact (R. 7a–11a), and concluded (R. 11a) that American Crayon had violated Section 2 (a) of the Clayton Act by discriminating in price between different competing purchasers of its products, and had violated Section 2 (d) of the Act by granting discounts to some of its customers as compensation for services and facilities furnished by them without making such discounts available on proportionally equal terms to its other customers who were in competition with the favored customers. The Commission, on December 31, 1940, issued a six-paragraph cease-and-desist order prohibiting the discrimi-

[2] As to the Section 2 (d) violations, the stipulation stated (R. 4a–6a) that American Crayon granted a special discount to a class of customers designated as "special or promotional distributors" for the performance of special services; and that the additional discounts were not made "available on proportionally equal terms to other customers who are in competition with such 'special or promotional distributors' ", since other wholesale customers who were "willing and able" to perform the extra services were refused the special discount.

natory selling practices (R. 12a–14a). Paragraphs 1–3 of the order dealt with the 2 (a) violations, and paragraphs 4–6 dealt with the 2 (d) violations. No judicial review was then sought of the order.

In September 1951, the Commission instituted an investigation to determine whether American Crayon had violated the order (R. 14a–18a).[3] After a formal evidentiary hearing, the Commission issued a report (R. 77a–87a) in which it concluded that the evidence showed "serious and substantial" violations of paragraphs 4–6 of the order (dealing with Section 2 (d)), but that the respondent had not violated paragraphs 1–3 (dealing with Section 2 (a)). The Commission then petitioned the court of appeals to affirm and enforce the entire order (App. 15).

On April 20, 1955, the court of appeals without opinion entered a judgment (App. 15–16) affirming and enforcing paragraphs 4–6 of the cease-and-desist order, and setting aside paragraphs 1–3. The judgment, after reciting that paragraphs 1–3 relate to Section 2 (a) and paragraphs 4–6 relate to Section 2 (d), that the Commission had found that its investigation "did not disclose substantial violations" of the former but that the evidence did show "serious and substantial violations" of

[3] In order to obtain judicial enforcement of an order under the Clayton Act, the Commission must show that the order has been violated. See *infra*, p. 9.

the latter, and that "the findings of the Commission are supported by substantial evidence upon the record considered as a whole," concluded:

> IT IS ORDERED that the order to cease and desist issued December 31, 1940, be and it is hereby modified by striking therefrom paragraphs 1, 2, and 3. Cf. *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 Fed. (2d) 510, 515 (C. A. 2);
>
> IT IS ORDERED that as so modified the order of the Federal Trade Commission is affirmed and enforced.

The Commission filed a timely petition for rehearing in which it argued that affirmance of a Commission order, as distinguished from enforcement, "depends solely on validity," not upon violation; that the *Standard Brands* case recognized this distinction, since the court there affirmed the entire order but enforced only those provisions of the order which had been violated; and that other courts of appeals "consistently" had affirmed orders "upon their merits where there has been no proof of violation". The court denied the petition without opinion (App. 17).

REASONS FOR GRANTING THE WRIT

The court of appeals set aside portions of a Commission order not because it found that such provisions were invalid, but solely because the Commission had not shown that they had been violated (see *infra*, pp. 12–13). Such a rule, we submit, would seriously handicap effective en-

forcement of the Clayton Act. Furthermore, the decision below conflicts with decisions of this Court and of other courts of appeals which consistently have affirmed Commission orders without regard to whether they had been violated.

1. Section 11 of the Clayton Act, which authorizes the Commission to issue cease-and-desist orders, provides no penalties for their violation. It provides only that if a person fails or neglects to obey such order, the Commission may apply to a court of appeals "for the enforcement of its order." And, in order to obtain enforcement, the Commission must show not only that the order is valid, but also that it has been violated since issuance. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470; *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 F. 2d 510 (C. A. 2).

The Commission's customary practice, whenever it believes that one of its Clayton Act orders has been violated, is first to conduct administrative proceedings to determine that question and then, if it finds violation, to seek affirmance and enforcement in a single judicial proceeding.[4] Cf.

[4] At one time, the Commission sought affirmance and enforcement prior to conducting violation hearings. If the court upheld the order, it appointed the Commission as a master to determine the question of violation and, if violation were shown, then enforced the order. The Commission's current practice of determining the existence of violations prior to seeking enforcement was upheld in the *Standard Brands* case. 189 F. 2d at 512; see also *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 476, n. 11.

Standard Brands case, *supra,* p. 512. Since the various provisions of a Clayton Act order ordinarily are interrelated the Commission regularly seeks enforcement of the entire order even though only part may have been violated. That practice is a sound enforcement technique, since it enables the court to enforce portions of an order which, although not shown to have been violated, nevertheless may require enforcement in order adequately to protect the public. Section 11 of the Clayton Act authorizes the enforcement of an "order" if it has not been obeyed, and an "order" has not been obeyed if any part has been violated. If the court affirms but declines to enforce portions of a valid order which have not been violated, they continue in full force and effect, cf. *Standard Brands* case, *supra,* and if subsequently violated may then be enforced.

But if a court may set aside portions of an order merely because they have not been violated, even though they are lawful and valid in all respects, the Commission will face a serious dilemma whenever it finds that only parts of its order have been disobeyed. If it seeks and obtains affirmance and enforcement of only the violated parts, the result will be that, for the purpose of judicial proceedings, the order must be broken into fragments, and review will be piecemeal, involving a series of separate administrative and judicial proceedings, each dealing with only part of the order. If, on the other hand, the

Commission, in order to avoid such undesirable piece-meal proceedings, elects to seek affirmance and enforcement of the entire order, it runs the risk that the non-violated provisions, lawful though they be, will be set aside. If that happens, the consequence would be that the respondent could violate the stricken provisions with impunity, since the Commission would be able to stop such violations only by (1) conducting a new administrative proceeding and issuing a new order, and (2) awaiting still further violations, and then seeking enforcement. Thus, either course required by the decision below would lead to serious enforcement problems.

2. This Court and other courts of appeals have consistently affirmed Commission orders under the Clayton Act upon proof of validity without regard to violation. In *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, the court of appeals had affirmed such an order in its entirety, but refused to enforce it because no violation had been shown. This Court affirmed that decision, and in doing so implicitly held that proof of violation is not requisite for affirmance. 343 U. S. at 476, note 11. Moreover, the very case which the court below apparently cited as authority for setting aside portions of an order which had not been violated, *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 F. 2d 510 (C. A. 2), held directly to the contrary. There the court affirmed the entire order, and refused to enforce

only the one paragraph (out of four) which had not been violated. It did not, however, strike any portion of the order. If the court below had followed *Standard Brands*, it would have affirmed, not reversed, paragraphs 1–3.

Other court of appeals decisions similarly have affirmed Commission orders upon proof of validity.[5] In the light of this settled line of authority, we submit that it is beyond question that failure to show violation is irrelevant on the issue of affirmance, and certainly does not justify invalidation of a valid order.

Nevertheless, in this case the court below set aside paragraphs 1–3 of the order solely because no violation thereof had been shown. The judgment itself so indicates. It recites that the Commission had not found violations of paragraphs 1–3 but had found violation of paragraphs 4–6, and that the Commission's findings were supported by substantial evidence, and then orders that paragraphs 1–3 be stricken from the order. A clearer statement that the court was setting aside those paragraphs because they had not been violated could hardly be made. Although it is

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[5] E. g., *Federal Trade Commission* v. *Whitney & Co.*, 192 F. 2d 746 (C. A. 9); *Federal Trade Commission* v. *Herzog*, 150 F. 2d 450 (C. A. 2); cf. *Federal Trade Commission* v. *Baltimore Paint and Color Works, Inc.*, 41 F. 2d 474 (C. A. 4). Those cases arose under the prior practice whereby the court first affirmed the order, and then remanded the case to the Commission to determine the issue of violation. See footnote 4, *supra*, p. 9.

true that respondent contended before the court of appeals that those paragraphs were invalid, the court plainly did not so hold.* If it had, it would have so recited in its order, and would not have rested its reversal on the fact that the Commission had "found that the investigation did not disclose substantial violations of paragraphs 1, 2, or 3 of the order."

The decision below is thus in conflict with the foregoing decisions which consistently have affirmed valid orders without regard to violation. Indeed, in setting aside paragraphs 1–3 (as distinguished from refusing enforcement) the court below has departed from the general rule that reversal of an administrative order is justified only if the order is invalid.

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*The argument itself has no merit. The contention was that American Crayon's stipulation that the effect of its price-discriminations may have been to injure competition was ineffective because it was a conclusion of law, and that the remaining stipulated facts were insufficient to support the order. But it is a question of fact whether the discriminations had the stipulated effect on competition, and the stipulation clearly sufficed to support the order.

CONCLUSION

Because the decision of the court below is clearly at variance with this Court's decision in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, and because the issue is a simple one fully comprehensible on the basis of the order below and this petition, it is suggested that the Court may deem it appropriate to grant certiorari, and reverse, without further briefs or oral argument, the portion of the order of the court below which struck paragraphs 1, 2, and 3 of the Commission's order, and accordingly remand the case for further proceedings.[1]

Respectfully submitted.

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Federal Trade Commission.

SEPTEMBER 1955.

[1] Since the court of appeals set aside paragraphs 1–3 of the order, it did not reach the question whether, upon proof of violation of the other parts of the order, the Commission was entitled to enforcement of the entire order. If this Court reverses the court of appeals' action in striking paragraphs 1–3, the issue of their enforcement will be presented to the court of appeals on remand.

APPENDIX

No. 12,286

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERAL TRADE COMMISSION, PETITIONER
vs.
THE AMERICAN CRAYON COMPANY, RESPONDENT

ORDER

(Filed April 20, 1955)

Before ALLEN, MARTIN and STEWART, Circuit Judges.

This case came on to be heard upon the petition of the Federal Trade Commission for affirmance and enforcement of its order to cease and desist;

And it appearing that the order issued by the Commission contains six paragraphs, the first three of which relate to Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C., Section 13 (a);

And it appearing that the last three paragraphs relate to Section 2 (d) of the same Act, 15 U. S. C., Section 13 (d):

And it appearing that the Commission in its report issued April 29, 1953, upon its investigation of the alleged violation of its order to cease and desist found that the investigation did not disclose substantial violations of paragraphs 1, 2, or 3 of the order relating to Section 2 (a) of the amended Clayton Act;

And it appearing that the Commission further found that the evidence showed serious and substantial violations of paragraphs 4 and 5 and the succeeding paragraph of the order relating to Section 2 (d) of the amended Act;

And it appearing that the findings of the Commission are supported by substantial evidence upon the record considered as a whole;

IT IS ORDERED that the order to cease and desist issued December 31, 1940, be and it is hereby modified by striking therefrom paragraphs 1, 2, and 3. Cf. *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 Fed. (2d) 510, 515 (C. A. 2);

IT IS ORDERED that as so modified the order of the Federal Trade Commission is affirmed and enforced.

Approved for entry:

/s/ FLORENCE E. ALLEN.
United States Circuit Judge.

ORDER DENYING REHEARING

(Filed May 16, 1955)

The petition for rehearing of the Federal Trade Commission is denied.

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1955

FEDERAL TRADE COMMISSION, PETITIONER

vs.

THE AMERICAN CRAYON COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Inasmuch as the time for filing a petition for certiorari by the American Crayon Company has already been extended to Sept. 17,

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 13, 1955.

/s/ FELIX FRANKFURTER,
Associate Justice of the Supreme Court of the United States.

Dated this 12th day of August 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

FILED
OCT 10 19
HAROLD B. WILLEY

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 389.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

THE AMERICAN CRAYON COMPANY.

MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 389.

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

THE AMERICAN CRAYON COMPANY.

MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

The American Crayon Company ("American Crayon") hereby waives its right to file a brief in opposition to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Trade Commission.

American Crayon offers to join in the suggestion of the Solicitor General (p. 14 of his petition) that the Court may deem it appropriate to grant certiorari, and reverse, without further briefs or oral argument, the portion of the judgment of the Court below which struck paragraphs 1, 2 and 3 of the Commission's order, and remand the case for further proceedings.

American Crayon has also filed a petition for a writ of certiorari in this case (which in effect is a petition for a cross-writ). That petition seeks a review of the remainder of the judgment of the Court of Appeals; namely, that part of the order which the Court of Appeals affirmed and enforced.

Both petitions present the same question: Whether, in a proceeding for enforcement of a Commission cease and desist order under 15 U. S. C. 21, under which the Court of Appeals is empowered to affirm or set aside such order, the determination of the court to affirm a part, or to set aside a part, of the order depends solely on whether such part of the order has or has not been violated since issuance.

The complaint of the Solicitor General is that the lower court *set aside* a part of the Commission order, without passing on the question of its validity, solely because there was no showing of a violation of that part.

The complaint of American Crayon is that the lower court *affirmed* a part of the Commission order, without passing on the question of its validity, solely because there was a showing of violation of that part.

The Solicitor General's petition correctly[1] points out that affirmance of a Commission order depends solely on proof of validity, not on proof of violation. This contention applies with equal force to both parts of the order. The Court of Appeals indicates by its judgment that it did not hold either that the 2(a) part of the order was invalid or that the 2(d) part of the order was valid. If the judgment is to be reversed, it should be reversed in its entirety, for the reasons stated in the Solicitor General's brief as

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[1] American Crayon does not acquiesce, however, in all of the statements and contentions in the petition. In particular, it excepts to the statement (p. 13) that the Section 2(a) part of the order is unquestionably valid. The Commission itself in another proceeding (*In the Matter of National Biscuit Co.*, CCH Trade Regulation Reporter, Tenth Edition, Vol. 3, par. 25,066) rewrote a similar order on the plea of Commission counsel that it was "ambiguous" and "enigmatical" and that an enforcement decree based upon it would "raise still more questions of interpretation."

supplemented by the grounds set forth in the petition for a cross-writ of certiorari filed by American Crayon.

October, 1955.

THOMAS F. BUTLER, JR.,
Attorney for The American Crayon Company.

RICHARD R. KRUSE,
JOHN B. SPITZER,
Of Counsel.

No. 389. FEDERAL TRADE COMMISSION *v.* AMERICAN CRAYON CO. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Solicitor General Sobeloff*,

*Modified, *post*, p. 962.

Assistant Attorney General Barnes, Daniel M. Friedman, Earl W. Kintner and *Robert B. Dawkins* for petitioner. *Thomas F. Butler, Jr.* for respondent. Reported below: 223 F. 2d 264.